

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STELLA CHINYELU OKOLI; UZOMA EZEOKE,)
Plaintiffs,)
v.)
JANET NAPOLITANO, et al.,)
Defendants.)
)
2:10-CV-00515-LRH-RJJ
ORDER

Before the court is Defendants' Motion to Dismiss (#24¹). Plaintiffs filed an opposition (#27), and Defendants filed a reply (#29). Defendants also filed a motion for extension of time to file their reply (#28), which will be granted *nunc pro tunc*.

I. Fact and Procedural History

This is an immigration case brought by a mother and daughter concerning the mother's inability to obtain a United States immigrant visa. Stella Chinyelu Okoli ("Okoli") is a native of Nigeria and a citizen of Nigeria and the United Kingdom. Her daughter, Uzoma Ezeoke ("Ezeoke"), is a United States citizen residing in Nevada.

On October 13, 2001, Okoli sought entry into the United States at John F. Kennedy International Airport under the Visa Waiver Program (“VWP”). She was denied entry and ordered

¹Refers to court's docket entry number.

1 to depart the United States after an inspector with the Immigration and Naturalization Service
2 (“INS”) found her inadmissible for alien smuggling under Section 212(a)(6)(E) of the Immigration
3 and Nationality Act (INA), 8 U.S.C. § 1182(a)(6)(E). Okoli alleges she was falsely designated an
4 alien smuggler and summarily removed without any judicial or administrative proceeding to
5 ascertain the truth of the allegation.

6 Years later, her daughter, Ms. Ezeoke, filed an I-130 Petition for Alien Relative on Okoli’s
7 behalf. The United States Customs and Immigration Service (“USCIS”) approved the petition on
8 or about June 30, 2009, and transferred it to the National Visa Center for processing. Okoli applied
9 for an immigrant visa based on the approved I-130 and was interviewed at the United States
10 Embassy in Lagos, Nigeria, on or about August 10, 2009. The same day, the consular officer
11 denied Okoli’s visa application on the basis that Okoli had been found inadmissible under 8 U.S.C.
12 § 1182(a)(6)(E) for alien smuggling in 2001.

13 On April 13, 2010, Okoli and Ezeoke filed the underlying complaint, styled as a “Petition
14 for Writ of Mandamus and Complaint for Declaratory, Injunctive, and Due Process Relief.” Doc.
15 #1. Plaintiffs allege that Okoli qualifies as an immediate relative of Ezeoke, a U.S. citizen, for
16 purposes of INA § 201(b)(2)(A)(i), that she is admissible to the United States as a lawful
17 permanent resident, and that an immigrant visa was and would be immediately available upon her
18 application. The complaint sets forth four causes of action for (1) violation of the INA, in that
19 Plaintiffs have been deprived of the opportunity to obtain an immigrant visa as a lawful permanent
20 resident; (2) injunctive relief under the Administrative Procedures Act (APA), 5 U.S.C. §§ 701 *et*
21 *seq.*, based upon Defendants’ alleged erroneous interpretation of the term “alien smuggler” in INA
22 § 212(a)(6) and the denial of Okoli’s immigrant visa application; (3) a duty to adjudicate Okoli’s
23 visa application on the basis that she remains an “immediate relative” of a U.S. citizen; and (4)
24 violation of Ezeoke’s procedural and substantive due process rights under the Fifth Amendment
25 through the denial of Okoli’s application for an immigrant visa based on the designation of Okoli

1 as an alien smuggler in 2001 without factual or legal basis or right of appeal. *See* Doc. #1, pp. 6-7.
 2 Plaintiffs pray for the following forms of relief: (1) a declaration that Ezeoke filed the necessary I-
 3 130 Petition and that Okoli was not stripped of her status as the mother of a U.S. citizen; (2) a
 4 declaration that Okoli must be considered an immediate relative in the processing of a properly
 5 filed visa application; (3) an injunction prohibiting the government from using Okoli's 2001 alien
 6 smuggler designation as a basis for denying a future visa application, until the charge can be
 7 proven; (4) an injunction prohibiting the government from using the denial of Okoli's prior visa
 8 application as a basis for denying a future visa application; and (5) a writ of mandamus compelling
 9 the government to treat Okoli as an immediate relative of a U.S. citizen, to adjudicate her visa
 10 application, and to direct the Secretary of State to issue her an immigrant visa. *Id.* at 7-8.

11 On October 15, 2010, Defendants filed the instant motion to dismiss. Doc. #24.
 12 Defendants argue that Okoli's immediate relative status is an improper basis for relief because that
 13 status was never changed, it is uncontested, and her visa application was not denied on that basis.
 14 *Id.* at 6-7. On the contested issues, Defendants argue this court lacks subject-matter jurisdiction to
 15 review either Okoli's removal in 2001 or the consulate's denial of Okoli's visa application in 2009.
 16 *Id.* at 1. Defendants also move to dismiss the USCIS defendants, Emilio T. Gonzalez and Lola
 17 Parocua, as improperly named parties because neither found her inadmissible or denied her visa
 18 application. *Id.* at 28. Defendants further offer to substitute the U.S. Bureau of Customs and
 19 Border Protection ("CBP") if necessary to grant complete relief to Plaintiffs. *Id.* at 28 n.15.

20 In response, Plaintiffs deny claiming that Defendants have changed or attempted to change
 21 Okoli's immediate relative status, deny challenging her removal in 2001, and deny challenging the
 22 denial of her visa application in 2009. Doc. #27, p. 2. Instead, Plaintiffs define their claim as
 23 challenging the government's action in maintaining in its records the designation of Okoli as an
 24 "alien smuggler" which, unless removed, will prevent Okoli from being able to obtain an
 25 immigrant visa on re-application. *Id.* at 2-3. Plaintiffs do not contest dismissing the USCIS
 26

1 defendants provided that the inclusion of the remaining defendants is sufficient to grant appropriate
2 relief, if warranted. *Id.* at 6.

3 **II. Discussion**

4 **A. Subject-Matter Jurisdiction**

5 Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*,
6 437 U.S. 365, 374 (1978). “A federal court is presumed to lack jurisdiction in a particular case
7 unless the contrary affirmatively appears.” *Stock West, Inc. v. Confederated Tribes of the Colville*
8 *Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

9 Federal Rule of Civil Procedure 12(b)(1) provides that a court may dismiss a claim for lack
10 of subject-matter jurisdiction. Although the defendant is the moving party in a motion to dismiss,
11 the plaintiff is the party invoking the court’s jurisdiction. The plaintiff therefore bears the burden
12 of proving that the case is properly in federal court. *McCauley v. Ford Motor Co.*, 264 F.3d 952,
13 957 (9th Cir. 2001).

14 Here, Plaintiffs have disclaimed any challenge to Okoli’s 2001 removal or to the 2009
15 denial of her visa application. Instead, they purport to challenge only the maintenance in Okoli’s
16 immigration file of the allegedly-erroneous designation of Okoli as an alien smuggler, and they
17 argue this court has federal question jurisdiction to adjudicate such a challenge. As Defendants
18 argue in reply, however, Plaintiff’s challenge to the alien smuggler designation in Okoli’s
19 immigration file is inextricably intertwined with 2001 incident where Okoli was denied entry under
20 the VWP based on the INS’s finding that she was inadmissible for alien smuggling under 8 U.S.C.
21 § 1182(a)(6)(E). Thus, a challenge to the alien smuggler designation in Okoli’s file is necessarily a
22 challenge to the 2001 inadmissibility finding, over which this court lacks jurisdiction. *See* 8 U.S.C.
23 § 1187(b)(1) (providing that an alien applying under the VWP must waive “any right . . . to review
24 or appeal under this chapter of an immigration officer’s determination as to the inadmissibility of
25 the alien at the port of entry”); *id.* § 1187(g) (eliminating judicial review and jurisdiction over any

1 claim attacking the validity of a denial of waiver based on a ground of inadmissibility); *Itaeva v.*
 2 *INS*, 314 F.3d 1238, 1241 (10th Cir. 2003).

3 Plaintiffs do not address § 1187 in their opposition. Instead, Plaintiffs argue that this court
 4 has jurisdiction to review a claim that an immigration file contains erroneous information, citing
 5 *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008). That is not what *Bustamante* held,
 6 however. *Bustamante* involved a narrow exception to the doctrine of consular non-reviewability,
 7 holding that courts may undertake a limited judicial inquiry of a consular official's denial of a visa
 8 application where a U.S. citizen relative's constitutional rights are implicated. *Id.* at 1062 (citing
 9 *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)). The court held that its inquiry was limited to
 10 determining whether the reason given for the denial is facially legitimate and bona fide and did not
 11 extend to whether the reason was correct. *Id.* at 1062-63. Here, Plaintiffs have disclaimed any
 12 challenge to the consular officer's denial of Okoli's visa application in 2009, taking this case
 13 outside *Bustamante*.²

14 Plaintiffs also argue that jurisdiction exists because the presence of the alien smuggler
 15 designation in Okoli's file will continue to deny them reunification, making the controversy not
 16 moot as a "recurring controversy" or "capable of repetition, yet evading review." Doc. #27, pp. 4-
 17 5. That the controversy is not moot does not establish that this court may exercise subject-matter
 18 jurisdiction over that controversy, however. Because Plaintiffs fail to establish any basis upon
 19 which subject-matter jurisdiction may be found, the action must be dismissed in its entirety.

20 **B. Leave to Amend**

21 Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend a
 22 pleading once "as a matter of course" before a responsive pleading is served. Fed. R. Civ. P. 15(a).

24 ²Even if the exception were applicable to Plaintiffs' due process challenge to the 2001
 25 inadmissibility finding notwithstanding the restrictions on judicial review in § 1187(b)(1) and (g), the
 26 claim would fail because the reason given (alien smuggling under § 1182(a)(6)(E)) is facially legitimate
 and Plaintiffs do not allege bad faith. See *Bustamante*, 531 F.3d at 1062-63.

1 If a responsive pleading has been filed, “a party may amend its pleading only with the opposing
2 party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). Leave to amend shall be
3 freely given “when justice so requires.” Fed. R. Civ. P. 15(a)(2); *Jones v. Bates*, 127 F.3d 839, 847
4 n.8 (9th Cir. 1997); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185 (9th Cir. 1987).

5 “In exercising its discretion ‘a court must be guided by the underlying purpose of Rule 15 –
6 to facilitate a decision on the merits rather than on the pleadings or technicalities.’” *DCD*
7 *Programs*, 833 F.2d at 186 (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)).
8 Rule 15’s policy of favoring amendments to pleadings should be applied with “extreme liberality”
9 insofar as the motion to amend is not sought in bad faith, does not cause undue delay, does not
10 cause the opposing party undue prejudice, and does not constitute an exercise in futility. *Id.* The
11 party opposing the amendment bears the burden of showing prejudice. *Id.* at 187.

12 Here, Plaintiffs seek leave to amend merely “to more fully set forth” the claim that they
13 have already set forth and clarified in their opposition papers. Doc. #27, p. 6. Because this court
14 lacks subject-matter jurisdiction to consider that claim, such amendment would be futile. Leave to
15 amend will therefore be denied.

16 IT IS THEREFORE ORDERED that Defendant’s motion to extend time to file a reply
17 (#28) is GRANTED nunc pro tunc.

18 IT IS FURTHER ORDERED that Defendants’ Motion to Dismiss (#24) is GRANTED.

19 IT IS FURTHER ORDERED that Plaintiffs’ request for leave to amend is DENIED.

20 IT IS SO ORDERED.

21 DATED this 10th day of May, 2011.



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23
24 LARRY R. HICKS
25 UNITED STATES DISTRICT JUDGE
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